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No. 98-1802

In The

Supreme Court of the United States

BALTIMORE CITY POLICE DEPARTMENT, et al.,

Petitioners,

v.

FRATERNAL ORDER OF POLICE, LODGE 3, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF

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REPLY BRIEF

The Respondents' Brief in Opposition ("Resp.") interjects additional issues and contains erroneous assertions of fact and law that require correction. For these reasons and to identify apparent substantial concessions, a reply is warranted.

1. Respondents Erroneously Assert that this Petition does not Address the Primary Duty Test of Part 541

Respondents suggest the Petition raises administrative law issues not present in this case by repeatedly suggesting that Petitioners' arguments are directed solely to the "salary basis" test of Part 541 and not to the "primary duties" tests (vast majority of sections, *see, e.g.*, App. 141a-152a). They assert the "Police Department has not attempted to mount any sort of challenge to the primary duty test portion of Part 541." Resp. at 9; *see id.* at 2, 4, 8, 9, 11. Petitioners prevailed on the salary basis test issues on summary judgment, App. 18a-24a, 72a, so Respondents argue that issues on which Petitioners prevailed below were certified under 28 U.S.C. § 1292(b). App. 3a-6a, 75a-76a. The challenge to the primary duty tests was preserved. *E.g.*, Fourth Am. Answer ¶ 32; Defs.' Mot. for Partial Summ. J. at 84, 97-98; Defs.' Reply in Supp. of Mot. for Partial Summ. J. at 39; Appellants' Br. at 27; Appellants' Pet. for Reh'g at 9.

Respondents acknowledged the primary duty test was at issue on summary judgment, claiming that "[i]n reference to the primary duty test . . . there was clearly adequate notice and comment." Pls.' Resp. to Defs.' Mot. for Partial Summ. J. at 36. They also addressed the primary duty test at argument on the motion: "[W]hat the Defendants . . . do is extrapolate and say, . . . because we don't have any affirmative response by DOL regarding the *primary duty test*, . . . they must be ignoring some comments. . . . " Hearing Tr. at 96-97 (Oct. 13, 1995) (emphasis added); *see id.* at 149.

The district court expressly acknowledged the issue and decided it: "Defendants rely on numerous [DOL] comments . . . to support their contention that Part 541, *in its*

entirety, is arbitrary, capricious, and inconsistent with congressional intent. . . . While applying the *primary duty test* to public sector plaintiffs in paramilitary organizations is not without its impracticalities, there is no evidence that it is an impermissible construction of the FLSA." App. 60a (emphasis added). It is that ruling on the primary duty test that was addressed on appeal, as both Respondents and DOL acknowledged.

Before the Fourth Circuit, DOL, as *amici curiae*, acknowledged that the primary duty test was at issue on appeal. "The police department . . . has also established no reason why the *duties tests* cannot apply to public sector law enforcement. . . . There is nothing inherent in police management that prevents the City of Baltimore . . . from satisfying the *Part 541 duties tests*." Brief for [DOL] as Amicus Curiae at 29 (emphasis supplied). Respondents likewise asserted: "[Petitioners] make [ ] the unsupported assumption that, because there were not other changes in the regulations, particularly changes in the *primary duty test*, that there was *ipso facto* some failure in the process." Appellees' Br. at 9 (first emphasis added).

Petitioners' first question presented addresses administrative law challenges to Part 541's primary duty test. Pet. at i; *see id.* at 2-4, 8-9, 12-15, 19-24. Respondents failed to acknowledge here the regulations subject to Petitioners' challenge and, consequently, failed to explain why the primary duty test issues are not worthy of this Court's attention.

2. The Court Invited this Petition in *Auer* and There is Post-*Auer* Confusion among the Lower Courts

a. The Court Invited a Petition Presenting these Challenges to Part 541

Respondents acknowledge that in *Auer v. Robbins*, 519 U.S. 452 (1997), this Court expressly drew a "distinction between [1] a challenge to an agency's failure to amend a regulation and [2] a challenge to an agency's regulation [*a*] based on its interpretation of the enabling statute or [*b*] based on flaws in procedural requirements under the APA," Resp. at 1, such as a failure to comply with notice-and-comment

requirements in promulgating regulations. Respondents assert that the Court could have been clearer if it intended to "express a desire to hear a case specifically addressing the disciplinary-deduction rule of Part 541 as applied to state and local governments." Resp. at 1-2. But that is not the issue presented in the Petition. The Petition here challenges DOL's Part 541 regulations on the grounds that (a) application of Part 541 in this context produces results that are arbitrary, capricious, and inconsistent with congressional intent, Pet. at 24, and (b) DOL failed to comply with notice-and-comment requirements, *id.* at 19-22. It appears the Court did invite this case.

b. Post-*Auer* Confusion Among the Lower Courts Emphasizes the Importance of Resolving the Issue Now

Petitioners explained that the *Auer* statement that a party must first bring certain challenges to an administrative agency before asserting them in court was purely *dicta*. Pet. at 12-13, 22-23. Respondents do not claim otherwise, essentially conceding error below.

Lower courts are divided on the meaning of the *Auer dicta*. *See* Pet. at 13-15. Respondents' analyses of that confusion shows that the Fourth Circuit's error reflects a larger problem.

Respondents note that "[s]everal cases" identified in the Petition arise in a context where only the salary basis test of Part 541 is at issue. Resp. at 2. Respondents do not assert, however, that only the salary basis test of Part 541 was at issue in all the cited cases. *See* Pet. at 13-14 (discussing *Apfel, Cassell, Hernandez, Fort Hood Barbers Ass'n,* and *Boyd*). Moreover, *Adams v. United States,* 40 Fed. Cl. 303 (Fed. Cl. 1998), involved federal employees who are not subject to DOL's salary basis test. *Id.* at 304-05, 308. Respondents' effort to limit the *Auer dicta* to the salary basis test not now at issue, *see* pages 1-2 *supra*, actually undermines Respondents' position. Either that *dicta* applies only to the salary basis test not at issue here, or the cited cases demonstrate the confusion among the lower courts as to the meaning and breadth of the *Auer dicta*.

Respondents note that three cases identified in the Petition "did not challenge rulemaking procedures, but addressed agency interpretation, invoking analysis under *Chevron*." Resp. at 3. That point was precisely what Petitioners sought to demonstrate; in those cases the courts did not read *Auer* as foreclosing challenges on grounds that the regulations are arbitrary, capricious, or not otherwise in accordance with law. Respondents thus effectively concede that these cases conflict with the Fourth Circuit in this case and with cases from the Third, Seventh, and Eleventh Circuits addressed above. *See* Pet. at 13.

Respondents assert that *Cassell v. FCC*, 154 F.3d 478 (D.C. Cir. 1998), "specifically declined to address a rulemaking challenge under the exhaustion doctrine." Resp. at 3 (citing 154 F.3d at 485). But that court did go on to address the merits of the notice-and-comment challenge to the extension of pre-existing regulations. 154 F.3d at 486.[1]

3. This Case Presents a Record for *Garcia* Balancing

Respondents refer to *Printz v. United States*, 117 S. Ct. 2365 (1997), and *New York v. United States*, 505 U.S. 152 (1992), and assert: "Neither case made any references to balancing tests." Resp. at 5. To the contrary, the *Printz* Court explained that "such a 'balancing' analysis [as employed in several earlier Tenth Amendment cases] is inappropriate" in the circumstances of *Printz*. 117 S. Ct. at 2383. Various authorities have recognized that *Printz's* "balancing" characterization encompasses *Garcia v. SAMTA*, 469 U.S. 528 (1985). *E.g.*, *Pryor v. Reno*, 171 F.3d 1281, 1286-87 (11th Cir. 1999); *Travis v. Reno*, 163 F.3d 1000, 1003 (7th Cir. 1998), *cert. filed*, 67 U.S.L.W. 3717 (U.S. May 11, 1999) (No. 98-1818); *see also* Brown, *Stealth Statute – Corruption, The Spending Power, and the Rise of 18 U.S.C. § 666*, 73 NOTRE DAME L. REV. 247, 299 (1998).

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[1] Moreover, the *Cassell* exhaustion issue arose because during the course of an administrative adjudication the party failed to present an issue he sought to raise on appeal.

4. This Case Presents Issues of Extreme National Importance

a. The FLSA Imposes Billions of Dollars in Costs Nationwide

Respondents belittle the "enormous costs" imposed by the FLSA because governmental "entities . . . receive a sizable amount of federal money each year, *even if not linked directly to the FLSA*." Resp. at 7 (emphasis added). Even directly related payments may not be relevant. *See Garcia,* 469 U.S. at 555 n.21. When this Court has permitted federal regulation of States under Spending Clause legislation, the Court has required "germaneness" or "relatedness" between the federal funding and the conditions. *E.g., South Dakota v. Dole,* 483 U.S. 203, 208 & n.3 (1987). No such nexus is necessary if the Commerce Clause authorizes costly requirements (such as the FLSA) upon all State and local governments without one.

Nor does the fact that Congress may impose unfunded costs under some Commerce Clause legislation, *see* Resp. at 7-8, necessarily mean that all such Commerce Clause legislation passes constitutional muster. *See United States v. Lopez,* 514 U.S. 549 (1995). Moreover, the constitutionality of the very statutes cited as examples remains unsettled. *E.g., Kimel v. Florida Bd. of Regents,* 119 S. Ct. 901, 902 (1999) (Nos. 98-791 & 98-796) (challenging the ADEA). The Court is likely to be called upon to revisit the scope of the commerce power as soon as next Term. *E.g., Brzonkala v. Morrison,* No. A-978 (U.S. June 8, 1999) (granting enlargement for petitioning for certiorari); *United States v. Morrison,* No. A-977 (U.S. May 25, 1999) (same).

Citing the 1985 FLSA Amendments, Respondents point to mitigating provisions as evidence of State effectiveness in the political process. Resp. at 14. To say that when confronted with *Garcia*-sanctioned federal occupation of State wage authority and potentially unlimited, retroactive back-pay liability, States were effective because they received some mitigation, is like saying the Kosovar Albanians were effective in the Yugoslavian political process because occupying Serbian armies allowed some ethnic Albanians to leave Kosovo rather than be killed.

b. DOL Did Not Comply with APA Notice-and-Comment Requirements

Respondents no longer assert that the rulemaking DOL initiated in 1985 satisfied the notice-and-comment requirements for Part 541 or that DOL's proceedings on Part 541 prior to extension of the FLSA to the public sector is sufficient.[2]

Respondents now assert only "that notice and comment rulemaking existed in reference to the original 1974 amendments extending the FLSA to state and local governments." Resp. at 10. Respondents do not cite any proceeding other than on the original version of Part 553. DOL did not institute a Part 541 rulemaking in 1974, or at any time prior to *Garcia*, to implement the 1974 Amendments to the FLSA, because the 1974 Amendments were enjoined and not effective. *See National League of Cities v. Brennan*, 419 U.S. 1321 (1974).[3] Thus, they rely exclusively on Part 553 to validate Part 541.

Respondents argue that Part 541 "was adopted for application to the public sector . . . in Part 553" through a cross-reference to Part 541 in 29 C.F.R. § 553.32. Resp. at 9; *see id.* at 10-11. But when DOL promulgated Part 553, both in 1987 and 1974, it acknowledged receiving comments on revisions to Part 541 but refused to address them in the Part 553 proceeding because of the "pending" Part 541 rulemaking. Pet. at 8, 21 (citing 52 Fed. Reg. 2012, 2019, 2023 (1987) (App. 89a); 39 Fed. Reg. 44,142, 44,142 (1974)). Such proceedings cannot satisfy the requirement that the agency *consider* and *address* comments received. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979) (agency must provide

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[2] Without citation, Respondents assert that States and municipalities "were also able to participate in the initial notice and comment rulemaking under which the current rules are promulgated." Resp. at 13. If Respondents intend to defend the adoption of Part 541 decades prior to the 1974 Amendments to the FLSA, they do not explain how notice was adequate for States and municipalities at a time when they were expressly excluded from FLSA coverage.

[3] In their Fourth Circuit reply (at page 14 & attachments A & B) Petitioners submitted all 1974 Federal Register notices affecting Part 541 (proposing only dollar limit adjustments).

"the consideration that is the necessary and intended consequence of" permitting "interested persons notice and an opportunity to comment"); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 758 (1972) ("after consideration of the record so made the agency shall" provide "a concise general statement of their basis and purpose").

c. When Applied to State and Local Government Employers, Part 541 Produces Results which are Arbitrary, Capricious, and Contrary to Congressional Intent

Respondents incorrectly assert: "The Supreme Court has already passed on the propriety of such application [of DOL regulations to public sector employees] in numerous cases, including *Garcia* and *Auer*." Resp. at 7. *Garcia* considered solely whether the Tenth Amendment proscribed application of the FLSA to a local transit authority. 469 U.S. at 536. This Court did not address whether pre-existing Part 541 properly applied to State and local governments. *Id.* at 557. In *Auer*, the Court below held that the salary basis test of Part 541 was satisfied. *Auer v. Robbins*, 65 F.3d 702, 711 (8th Cir. 1995). This Court affirmed, but, in *dicta*, dismissed on procedural grounds an "arbitrary and capricious" challenge to that test raised for the first time in this Court. *Auer*, 117 S. Ct. at 910. The Court did not consider the *merits* of the challenge. This Court has never considered the merits of Part 541's primary duty tests as applied to police management – the challenge presented here.

The Fourth Circuit erroneously refused to address Petitioners' substantive challenge to Part 541, citing the *Auer dicta*. Respondents do not attempt to show that the language in *Auer* is anything other than *dicta*.

Petitioners demonstrated the *Auer dicta* is flawed on many grounds, relying on several lines of Supreme Court precedent. Pet. at 23-24. Respondents ignore those arguments and only purport to distinguish the identified cases because they "did not address rulemaking or notice and comment challenges" but only evaluated an "agency interpretation utilizing an arbitrary and capricious standard." Resp. at 3. That distinction shows that the *Auer dicta*

excludes more than notice-and-comment challenges. Instead, Respondents confirm Petitioners' point that their defenses may be raised first in court.

Petitioners also explained that *Auer* did not consider the futility of requiring a formal petition to DOL when a rulemaking is already pending. Pet. at 23; *see id.* at 6, 7, 21, 22. Respondents' only answer claims this Petition is limited to the salary basis test. Resp. at 11. It is not, *see* pages 1-2 *supra*, and DOL's pending Part 541 proceeding solicited comments on the "duties and responsibilities" tests. 50 Fed. Reg. 47,696 (1985) (App. 87a).[4]

On the merits of applying pre-existing Part 541 to the public sector, Respondents rely exclusively on congressional *inaction*. Resp. at 12. But "congressional silence lacks persuasive significance." *Brown v. Gardner,* 513 U.S. 115, 121 (1994); *see Zuber v. Allen,* 396 U.S. 168, 185 n.21, 193 n.28 (1969). Moreover, here, DOL has repeatedly assured Congress and the public that it is in the process of addressing the Part 541 issues.

d. Balancing the Evidence Shows a Failure in the National Political Process

Respondents do not refute the document-supported *evidence* of federalism experts, Congressman John N. Erlenborn and Professor A.E. Dick Howard, who were uncontradicted by other witnesses. Instead, Respondents assert that "neither . . . was able to show with particularity" defects and burdens "in the instant case"

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[4] In the district court, Petitioners introduced an example of primary duties tests comments filed in response to this DOL notice. Ex. 36. When Respondents suggested to the Fourth Circuit that DOL did not receive such comments, Petitioners filed numerous additional examples. That court took judicial notice of these submissions by order filed July 3, 1997.

DOL amended the salary basis test by adding a new section, 29 C.F.R. § 541.5d, in 1992, in a separate notice-and-comment proceeding. Pet. at 21. DOL again refused to consider comments on other aspects of Part 541. 52 Fed. Reg. 37,666, 37,674 (1992) (App. 92a). Therefore, when DOL referred to "public sector employees" and acknowledged in 1994 that "the regulations are sorely out-of-date, and a comprehensive rulemaking is necessary," DOL's statements encompassed the "primary duty" tests.

or "any sort of nexus between the application of Part 541" and "the failure of the national political process." Resp. at 13.

The depositions of Congressman Erlenborn and Professor Howard, *see* Ex. 222, Ex. 220, their declarations, *see* App. 99a-112a, 113a-132a, plus exhibits, *see* 96a-98a, detailed the political process changes which cumulatively, they conclude, result in failures in the national political process which unduly burden States. Professor Howard specifically tied these cumulative failings to the ineffectiveness of State and local governments in lobbying Congress for exemptions from the FLSA following *Garcia*. App. 115a, 125a-126a. This abundant *evidence* (which *is* tied to the FLSA) should be considered in the *Garcia* "balancing test" rather than dismissed out-of-hand as occurred in this case below. App. 6a-7a; 64a-65a.

The district court acknowledged that it did not understand the test. App. 63a-64a. Petitioners demonstrated the total absence of reported cases purporting to apply a *Garcia* balancing, confirming this confusion throughout the federal judiciary. Pet. at 16-17. This comprehensive *evidentiary* record directed specifically to that test warrants review.

e. Application of the FLSA and DOL's Implementing Regulations to Police Management is Unconstitutional

Respondents' argument that Petitioners raise no credible argument under the Commerce Clause fails to cite *Lopez*. Respondents' view of the Commerce Clause recognizes nothing that falls outside congressional power; it would justify a general federal police power that would have upheld even the statute invalidated in *Lopez*.

Respondents similarly reject *Printz's* explanation of the Necessary and Proper Clause. Resp. at 15. *Printz* rejected the reading which Respondents now advocate. Pet. at 28; *see also Hopkins Fed. Sav. & Loan Ass'n v. Cleary*, 296 U.S. 315, 338-39 (1935).

Respondents argue that the Guarantee Clause is irrelevant because only the "ultimate arbiter of policy" (*i.e.*, the Police Commissioner or Mayor) exercises the type of discretion essential to maintaining a republican form of government. Resp. at 16-17. Referring to police officers (not to mention supervisory sergeants

and lieutenants), this Court has recognized their "broad powers," their "exercise [of] . . . a very high degree of judgment and discretion," and that they perform "a most fundamental obligation of government." *Foley v. Connelie,* 435 U.S. 291, 297, 298 (1978); *see City of Chicago v. Morales,* 67 U.S.L.W. 4415, 4420 & n.32 (U.S. June 10, 1999) (No. 97-1121). The police should join governors, legislators, and judges within the Guarantee Clause's protection because they control "how often that [State's] power is exercised." Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century,* 88 COLUM. L. REV. 1, 56 (1988).

Respondents argue that "*New York* and *Printz* should not be read to alter the way the Court views federalism" because they did not apply *Garcia*. Resp. at 17-18. The fact that these cases address Tenth Amendment issues without relying upon *Garcia* places the vitality of *Garcia* in issue. Respondents dismiss process-oriented federalism theory as "circular," *id.* at 18, by overlooking the fact that the 1938 enactment of the FLSA applied to only the private sector so that in 1974 States were isolated in the political process. The Court currently has on its docket a case which may focus on process-oriented federalism. *See Reno v. Condon,* 119 S. Ct. 1753 (1999) (No. 98-1464).

CONCLUSION

The Petition for a Writ of Certiorari should be granted. In the alternative, the Petition should be held pending the decisions in *Condon, Kimel*, and, if granted, *Brzonkala*, and then addressed as appropriate in light of the decisions in those cases.

Respectfully submitted,

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